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IN THE

SUPREME COURT OF THE UNITED STATES

NO. 611, OCTOBER TERM, 1968

JAMES WILLIAM MOORE, JAMES THOMAS FRASIER AND GLENN E. DAVIDSON,
Petitioners,

v.

STATE OF ARKANSAS,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF

PROPOSITION 1

That the search and seizure of the evidence in chief in the case at bar was seized in violation of the petitioners' rights provided by the 14th Amendment of the U. S. Constitution.

The Sheriff of White County seized what he determined to be burglar tools and gambling devices on the basis of two search warrants issued by Bald Knob Mayor Norris Fox on April 19, 1967. Petitioners filed a motion

to suppress the evidence obtained as a result of these two search warrants and alleged as their grounds that the two warrants were invalid.

A few days prior to April 18, 1967, there had been a bank hold-up in Woodruff County wherein one of the appellants, James T. Frazier, had been implicated. Police authorities in White County had information that there was going to be a bank hold-up or burglary in White County. The F.B.I. and local Bald Knob police authorities had petitioners under surveilance when they checked into rooms 110 and 111 in the Americana Motel in Bald Knob, Arkansas.

Sheriff John Davis was called after dark on April 18th and he shortly arrived in Bald Knob. Upon the results of the surveilance of the motel and other information he made out an affidavit to Mayor Fox who was satisfied that there was probable cause and he therefore issued a search warrant to search the two rooms at the Americana Motel, petitioners' 1955 Chrysler and the U-Hall Trailer attached thereto. The officers were to search for burglary tools. At the time this search warrant was obtained the Sheriff had information that there was another car to come into White County with the persons therein to meet petitioners and to bring in other burglary tools. The Sheriff served the search warrant on petitioners in their rooms in the Americana Motel and subsequently searched the rooms, the car and the trailer where he found certain tools in the car which he determined to be burglary tools. At that time he also saw what he classified as a gambling device in the trailer. The Sheriff seized the tools he classified as burglary tools but did not make any arrest.

The Sheriff and the other officers retired from the scene but kept appellants under surveilance. The officers observed at least one of the petitioners making phone calls and subsequently saw the wife of Leon Odom (Leon Odum was not on trial here with the petitioners as he was in the Oklahoma State Penitentiary at the time of the trial) pull up by petitioners' car. The Sheriff testified that Mrs. Odum had apparently circled the motel a few times before she was observed by the police officers. The Sheriff then talked with Mrs. Odum and asked to see her drivers license which she showed him. Mrs. Odum then left the area.

Subsequently petitioners pulled out of the motel and headed south toward Searcy when the officers apprehended them and made a second search of the automobile at which time a craftsman electric drill was found. Petitioners were arrested and at that time the Sheriff radioed to police officers in Bald Knob to obtain a second search warrant for a gambling device which was obtained and the gambling device was seized the next morning.

Ark. Const., Art. 2, §15 provides as follows:

> "The right of the people of this State to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized."

Ark. Stat. Ann. §41-2009 provides for search warrants for gambling devices and Ark. Stat. Ann. §43-201 provides as follows:

> "Upon complaint being made on oath, before any officer authorized to issue process for the ap-

> prehension of offenders, that any personal property has been stolen or embezzled, and that the complainant suspects that such property is concealed in any particular house or place if such officer shall be satisfied that there is reasonable ground for such suspicion, he shall issue a warrant to search for such property."

At the hearing on the motion to suppress, the State introduced the search warrants pursuant to which the searches were made. Although appellants subpoenaed the Sheriff, several officers who had been involved in the search, and the justice of the peace who issued the warrants, only one person, petitioner Glenn Davidson, was called in behalf of petitioners. His testimony amounted to little more than a narration of the searches and arrests. No attempt was made to show facts indicative of the alleged lack of probable cause. While petitioners contended that the warrants had been issued without oath or affirmation, the only evidence on this point was the testimony of the Sheriff, who stated that an affidavit as to the facts and circumstances showing probable cause had been made.

In their brief in support of their Petition for Certiorari in this court petitioners main attack is upon the validity of the first search warrant and its relation to the three searches that were made of petitioners.

Petitioners first complaint appears to be that the Sheriff did not follow certain Arkansas Statutes in obtaining the first search warrant. This attack appears to say that the search was made in the nighttime and only a daytime search was authorized because the word nighttime was not on the face of the search warrant issued.

We submit that the determination made by the Arkansas Supreme Court concerning this complaint is final.

Our court determined that there was compliance with the Arkansas Statutes by the police authorities in this case. The U. S. Supreme Court should not concern itself with the Arkansas Courts' determination and construction of Arkansas Statutes for obtaining search warrants. The only concern of the U. S. Supreme Court should be whether the obtaining of the search warrant complies with Amendment No. 4 to the United States Constitution. It is not a requirement of Amendment No. 4 that the search warrant obtained show nighttime or daytime on its face. In other words, this problem concerns itself with Arkansas Statutes and no Federal question is involved as it appears no Federal Constitutional right was involved or violated.

The fact that the federal rule concerning daytime or nighttime searches is the same as Arkansas statutes is of no concern of the U. S. Supreme Court because this search was not made by federal authorities but was made by state authorities and would be governed by state statutes. It is clear that the Arkansas Supreme Court determined that there had been complinance with Arkansas law and the U. S. Supreme Court should not interfere with this determination because there is no federal question involved.

We are concerned here, as far as Amendment No. 4 to the United States Constitution is concerned, with whether the warrant was issued upon probable cause, with whether it was supported by oath or affirmation and with whether it particularly described the place to be searched, and the persons or things to be seized.

Petitioners' attack probable cause by stating that the affiant (Sheriff) never stated from where his information was obtained and whether or not it was reliable.

The Sheriff testified that an affidavit had been made and petitioners, at the hearing on the motion to suppress, did not request that the affidavit be produced in evidence. We think the opinion of the Supreme Court of Arkansas on this question is a complete answer to petitioners' contension concerning lack of probable cause and lack of oath or affirmation.

Our court said in *Albright* v. *Karston,* 206 Ark. 307, 176 S.W. 2d 421, that where the search warrant is regular on its face and there is no proof that the "Oath or affirmation" was not made prior to its issuance, there is a presumption that all things essential to its validity have been done. It was therefore the duty of petitioners to come forward with evidence sufficient to rebut the presumption of validity. Additionally, the court noted the prevailing view that the burden of proof on a motion to suppress is on the accused. *Anderson* v. *United States,* 344 F. 2d 792 (10th Cir. 1965); *People* v. *Williams,* 20 N. Y. 2d 388, 283 N.Y.S. 2d 169 (1967). In *Wilson* v. *State,* 268 P. 2d 585 (Okla. Crim. 1954), the Oklahoma court, in noting that the burden was on defendant on his motion to suppress, said:

> "The burden of proving the invalidity of a search warrant rests on the defendant, and where he files a motion to suppress evidence or objects to the introduction of evidence on the ground the search warrant is not valid, he should produce the affidavit and warrant in evidence in support of such motion or objection, or account for the failure to produce and offer other competent evidence to show invalidity."

See, also, 22A C.J.S. Criminal Law §§578 and 657(32)(a); Varon, SEARCHES AND SEIZURES, §6(c). Our court further said that on the state of the facts in the case at bar, it

felt that appellants had failed to meet the burden incumbent upon them to show that the first warrant was invalid. The evidence seized as a result of the first search was, therefore, admissible and the motion to suppress properly overruled.

Further, we submit that if the petitioners felt that there was a lack of probable cause in the issuance of the warrant they could have called as a witness the summonsing magistrate who issued the warrant and might could have fully developed a lack of probable cause by cross-examining the Sheriff. They totally failed to do this so they have failed to prove that the warrant was issued without probable cause.

We think the above argument clearly establishes that the first search was conducted under a valid search warrant. This being true, the second search made under this warrant was, as the Supreme Court of Arkansas concluded, a valid and continuing search under the first search warrant. We have nothing further to add to the well reasoned opinion of the Supreme Court of Arkansas concerning the second continuing search under the first search warrant and will, therefore, set out what the Supreme Court of Arkansas said concerning it.

The Supreme Court of Arkansas said that with regard to the second search, petitioners contended that there was no probable cause therefor. After the first search, Sheriff Davis and his men withdrew from the premises but continued to keep petitioners under surveillance, since the sheriff had information that another car was to make contact with petitioners for the purpose of transferring burglar tools. During this period between the first and second searches, the wife of a companion of petitioners came to the motel. Having been identified by the officers.

she subsequently left. Thereafter, petitioners got into the car and appeared to be leaving town when they were stopped. On this occasion the petitioners were arrested and taken into custody. The result of the search was that a Craftsman Drill, not discovered during the first search, was found.

Our Court held that on the record before it, they felt that the second search was lawful and that the trial court was correct in its ruling that the evidence seized pursuant thereto was admissible. While there are numerous cases which state that a "return" search, conducted on the basis of the warrant issued for the original search, is not permissible, these cases seem to involve situations where the officers have completely abandoned the premises for a substantial period of time. See, *e.g., State* v. *Moran,* 103 W. Va. 753, 138 S.E. 366 (1927); *Coburn* v. *State,* 78 Okla. Crim. 362, 148 P. 2d 483 (1944); *McDonald* v. *State,* 195 Tenn. 282, 259 S.W. 2d 524 (1953); *State* v. *Pina,* 94 Ariz. 243, 383 P. 2d 167 (1963); Such is not the case here. The sheriff and his men, after making the first search and on information that there was to be a subsequent contact with petitioners, withdrew from the premises, but maintained constant vigil until such time as the arrests and second search were made. The second search was but a continuation and consummation of the first. There was reasonable cause to believe that other evidence, and, possibly other persons, would be involved. The reasonableness of a search in any case must be decided "upon its own facts and circumstances." *Go-Bart Importing Co.* v. *United States,* 282 U. S. 344, 51 S. Ct. 153, 75 L. Ed. 374 (1931). We cannot say that this record reflects an unconstitutional invasion at the time of the second search.

The Court further held that there was another ground on which it found the second search to be lawful, and that

was that it constituted a search incident to a lawful arrest. The first search had been made and the objects (consisting of two pairs of vice grips, a hand drill, and a pair of rubber gloves) lawfully seized. The officers thus had probable cause to arrest applicants for the crime of possessing burglary tools. Ark. Stat. Ann. §41-1006 (Repl. 1964). While it might be better procedure to make an arrest immediately upon seizure of evidence, we hesitate, on the peculiar facts and circumstances of this case, to say that it was unreasonable for the officers to delay the arrests until such time as is appeared that no other parties were involved. The arrests being lawful, the officers acted within the bounds of reason in searching the immediate premises under the control of appellants. *Harris* v. *United States,* 331 U. S. 145, 67 S. Ct. 1098, 91 L. Ed. 1399 (1947); *United States* v. *Rabinowitz,* 339 U. S. 56, 70 S. Ct. 430, 94 L. Ed. 653 (1950). Although there is sufficient justification for holding that the arrests occurred as soon as the officers stopped the car in which the petitioners were traveling, this would appear to be insignificant, since, in any event, the search and the arrests were "substantially contemporaneous." *Stoner* v. *California,* 376 U.S. 483, 84 S. Ct. 889, 11 L. Ed. 2d 856 (1964); *State* v. *Hoover,* 219 Ore. 288, 347 P. 2d 69, 89 A.L.R. 2d 695 (1959). Moreover, the fact that we are here concerned with the search of an automobile is significant. The courts, both federal and state, have long distinguished between searches of dwellings and vehicles. In the case of vehicles, the validity of the seizure is not dependent upon the right to arrest, but rather upon the reasonable cause the seizing officer has for the belief that the contents of the automobile offended against the law. *Carroll* v. *United States,* 267 U. S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1925); *Burke* v. *State,* 235 Ark. 882, 362 S. W. 2d 695; *Mann* v. *City of Heber Springs,* 239 Ark. 969, 395 S. W.

2d 557. For the reasons herein stated, we find that the second search was valid and reasonable under the circumstances of this case.

We would add, however, that the Sheriff did not testify as is contended by petitioners, that he arrested them based solely upon finding the craftsman drill on the second search. That clearly is not the testimony of the Sheriff. He said he arrested them because he found the craftsman drill and also the other things prompted him to make the arrest.

We submit that the third search was also valid and have nothing further to add to what the Supreme Court of Arkansas said concerning it. In this case the Arkansas Supreme Court noted that petitioners contended that there was impropriety in the third search which was carried out on the following day pursuant to another search warrant.

Our Court noted that apparently the basis for their contention was that there existed no probable cause for issuance of the warrant. The record indicates that during the course of the previously described searches, the sheriff observed a peculiar table which was wired, two large batteries, and another box containing: "some kind of device to operate the magnetism on the table." His suspicion that a gaming device had been uncovered was buttressed by the discovery of several pairs of dice in the suitcase of one of the petitioners. The sheriff did not immediately take any action with regard to the table and the supporting apparatus, but waited until after the second search, at which time he radioed in to headquarters, instructing that a separate search warrant be obtained pursuant to Ark. Stat. Ann. §41-2009. The sheriff testi-

fied that he subsequently made an affidavit stating the facts constituting probable cause.

As in the case of the warrant for the first search, petitioners have made no attempt to show that probable cause was lacking for the issuance of the warrant. It must therefore be held that they failed to meet the requisite burden of proof. Moreover, it is clear from the facts above stated that the gaming table was observed in open view at a time when the officers were lawfully on the premises conducting the previous searches. It has been held many times that where contraband articles are identified without a trespass on the part of the officer, there is not a "search" that is prohibited by the constitution. *Russell* v. *State,* 240 Ark. 97, 398 S.W. 2d 213; *United States* v. *Lee,* 274 U. S. 559, 47 S. Ct. 746, 71 L. Ed. 1202 (1927); *Ker* v. *California,* 374 U. S. 23, 83 S. Ct. 1623, 10 L. Ed 2d 726 (1963). From all that appears of record, the table could have lawfully been seized at the time it was observed. The officers should not be condemned for taking the added precaution of obtaining a search warrant. The table and supporting apparatus were properly admitted into evidence.

We agree with most of the cases cited by petitioners in their brief in support of their Petition for Certiorari. Our disagreement with those cases is that the facts in this particular case are not covered by those cases and therefore, they are not applicable here. There is a lack of evidence on the part of petitioners to support all of the complaints that they make concerning these searches and the seizures made pursuant thereto.

CONCLUSION

All the questions and complaints in petitioners' Petition for Certiorari were presented to the Supreme Court of Arkansas. They were fully considered by our court and found to be without merit in the opinion and the order denying a rehearing.

We submit that the Petition for Writ of Certiorari should be denied by this court in its discretion because no federal question is involved herein.

Respectfully submitted,

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